Supreme Court, U.S.
FILED
OCT 2 2001
OFFICE OF THE CLERK

No. 01-390

IN THE SUPREME COURT OF THE UNITED STATES

FARM CREDIT SERVICES OF MID-AMERICA,
Petitioner,

vs.

THOMAS M. ZAINO, TAX COMMISSIONER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Just last term, the Court held that the former National Bank for Cooperatives, a federally chartered lending institution within the Farm Credit System, was not immune from state taxation of its corporate income. *Director of Revenue v. CoBank*, 531 U.S. 316, 121 S. Ct. 941 (2001). The present case asks the Court to consider whether another institution within the Farm Credit System, an "agricultural credit association" ("ACA"), enjoys immunity with respect to income generated by *a portion of* its business ("Mid-America challenges only that part of the Ohio Supreme Court's decision which holds that Mid-America is subject to Ohio income tax [sic] on its income from long-term real estate mortgage lending," Pet. 7). Certiorari should be denied for two reasons: (1) the current claim that a *particular portion* of the ACA's business is not taxable was not properly presented to the Ohio courts and was not passed upon by the Ohio Supreme Court; (2) the asserted conflict does not merit review because the Indiana Supreme Court decided the alleged "conflict" case before *CoBank*, and without the benefit of its guidance. *CoBank's* teachings will provide sufficient guidance for the state courts from now on.

1. The petitioner, Farm Credit Services of Mid-America, is an ACA formed through a consolidation of former "federal land bank associations" ("FLBAs") and a former "production credit association" ("PCA"). The essence of Mid-America's claim to this Court is that the portion of the ACA's business that was inherited from the FLBAs, namely, the long-term real estate mortgage business, is immune from taxation. By contrast, the short-term loan business inherited from the PCA is not immune under Mid-America's current theory.

The alleged ground for this partial immunity lies in the statutory immunity that the former FLBAs enjoyed, 12 U.S.C. 2098, which contrasts with the limited immunity of PCAs, 12 U.S.C. 2077.

2. In this case, Mid-America sought total refunds of corporate franchise taxes that it had paid, contending that it was broadly exempt from Ohio corporate franchise tax as a "U.S. instrumentality" or a "federally chartered instrumentality." The nature of the relief requested proves the nature of the claim: the refund sought equaled the precise amount of tax paid for the whole entity. That same contention was repeated when Mid-America appealed first to the Ohio Board of Tax Appeals ("Ohio BTA"), and then to the Ohio Supreme Court. Attached are the notices of appeal to the Ohio BTA and the Ohio Supreme Court. Conspicuous by its absence is any reference whatever to a *partial* immunity, or to a pass-through immunity of the FLBA business as opposed to the PCA business.

In keeping with the specifications of the notices of appeal, Mid-America's briefs to the BTA and the Ohio Supreme Court relied on the theory of a total exemption from Ohio corporate franchise tax as a "federally chartered instrumentality." The one additional argument was the suggestion that 12 U.S.C. 2279c-1 might have passed through a complete tax immunity based upon an explicit pass-through of "powers" and "obligations" of the predecessor entities.

3. On September 1, 2000, the Indiana Supreme Court issued its decision in *Indiana Dep't of State Revenue v. Farm Credit Servs. of Mid-America, ACA*, 734 N.E.2d 551 (Ind. 2000). That decision was submitted to the Ohio Supreme Court as supplemental authority in this case, and was discussed by counsel and the court during oral argument on January 10, 2001. In addition, the pendency of the *CoBank* case before this Court was discussed.

On February 20, 2001, this Court issued its decision in *Director of Revenue v. CoBank*. On joint motion of the parties,

the Ohio Supreme Court granted leave and ordered the filing of the *CoBank* decision as supplemental authority.

4. The Ohio Supreme Court's decision, issued on June 6, 2001, addressed two points. First, the state court applied this Court's decision in *CoBank* to reject the proposition that Mid-America enjoyed an implied constitutional immunity as an "instrumentality" directly under the Supremacy Clause. Because Mid-America was a "privately owned business benefiting private interests," Pet. App. 6, the ACA did not meet the stringent *United States v. New Mexico* test as prescribed in *CoBank*.

Second, the Ohio Supreme Court in a single paragraph rejected the assertion that the pass-through of powers and obligations somehow also constituted a pass-through of state tax immunity.[1] Pet. App. 6. Nothing in the paragraph specifically addresses any distinction between the long-term real estate mortgage portion of the ACA's business and the short-term loan business. Nor is there any discussion of the legislative history and the federal regulations that formed the basis on which the Indiana Supreme Court conferred partial immunity in the alleged "conflict" case.

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[1] Mid-America's recitation concerning the Tax Commissioner's cross-appeal to the Ohio Supreme Court, Pet. 6, is not entirely correct. The Commissioner's notice of cross-appeal faulted the Ohio BTA for not recognizing that, given the structure of the Farm Credit Act, no constitutionally implied immunity was possible, and that therefore the immunity question would have to be resolved by reference to Congress's intent in the Farm Credit Act. The notice of cross-appeal also raised the question whether the Ohio BTA should have denied relief on the grounds that Mid-America asserted no statutory ground for immunity in its notice of appeal to the BTA.

REASONS THE WRIT SHOULD BE DENIED

A. The question Mid-America presents to this Court was neither properly presented to, nor passed upon by, the Ohio courts.

1. When certiorari is sought from a state court decision, the Court has "adhered to the rule" that "we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

This principle, sometimes referred to as the "not pressed or passed upon" rule, *Illinois v. Gates*, 462 U.S. 213, 219, 221 (1983), serves two main functions. First, it promotes comity with state courts by declining "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90, citing *Webb v. Webb*, 451 U.S. 493, 500 (1981). Second, "a constellation of practical considerations" animates the rule, "chief among which is our own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

The "not pressed or passed upon" rule applies here. First, the Ohio Supreme Court did not explicitly address an issue of partial immunity. Nor did the Ohio court anywhere evaluate the legislative history and federal regulations the Indiana court relied on in the alleged "conflict" case. Mid-America's petition points to the paragraph in which the Ohio Supreme Court did address the provision that passes through the "powers" and "obligations" of the predecessors to the ACA. Pet. 7. But that paragraph does not explicitly address the issue of *partial* immunity Mid-America wants to raise in this Court. Instead, the passage in the context of the entire decision merely

rejects the argument that the statutes pass through an "instrumentality" status that immunizes the whole ACA. The specific immunities of the predecessor associations, FLBA or PCA, receive no consideration.

Moreover, at each level of review in Ohio, Mid-America relied on the theory that it enjoyed broad state tax immunity as a "federally chartered instrumentality" of the United States. Nothing other than complete relief from Ohio corporate franchise taxation was ever sought. See notice of appeal to the Ohio BTA, ¶¶4,5, 8 [Respondent's App. A-3, A-4, A-13, A-14] ("Under Article VI, clause 2 of the Constitution of the United States Constitution [sic] ("Supremacy Clause"), no state may impose upon the United States or its instrumentalities an obligation to pay a tax, unless Congress expressly consents to the tax. [citations omitted]" and "Congress has not consented to state taxation of Agricultural Credit Associations and, as a result, Appellant is exempt from state income and franchise taxes, including the Ohio Corporate Franchise Tax"); notice of appeal to Ohio Supreme Court, ¶¶4, 5 [Respondent's App. A-25, A-26] (to the same effect).

Nor does partial immunity somehow qualify as "close enough" to the issues directly considered below. In *Wilson v. Cook*, 327 U.S. 474 (1946), the Court distinguished two separate state tax immunity arguments: an argument the tax imposed a burden of taxation on federal property or activities or unconstitutionally burdened the United States, 327 U.S. at 478, and an argument relating to the form of the tax whereby the collection activity might be conducted against the United States or liens imposed upon its lands, 327 U.S. at 483. The first question had been raised and decided in the state courts; the second had not. Although "the constitutional question now sought to be presented is in some measure related to that decided by the state court," the Court declined to consider the new question. *Id.*

Mid-America's new argument fails here just as did the new immunity argument in *Wilson*. Deciding that Mid-America enjoys no broad instrumentality immunity entailed no direct consideration of whether the structure of the Farm Credit Act somehow confers a partial immunity, based on the status of one of the ACA's predecessor corporations.

2. Since the Ohio Supreme Court "was silent on [the] federal question before us," *Adams*, 520 U.S. at 86, Mid-America must "demonstrate that [it] complied with the applicable state rules for raising [its claim before the state court]," 520 U.S. at 87-88, or else the ACA must "explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim." *Id.*

Mid-America cannot succeed in meeting this burden, because it failed to comply with the Ohio law that requires a taxpayer to specify errors when appealing determinations of the Tax Commissioner. *See Osborne Bros., Inc. v. Limbach*, 532 N.E.2d 739, 742 (Ohio 1988) (noting that court "lacks jurisdiction to hear" an error which "appellant did not specifically assign"); Section 5717.02, Ohio Revised Code (requiring specification in notice of appeal to Board of Tax Appeals), Section 5717.04 (notice of appeal to Ohio Supreme Court); *Manfredi Motor Transit Co. v. Limbach*, 518 N.E.2d 936, 940 (Ohio 1988); *Norandex, Inc. v. Limbach*, 630 N.E.2d 329, 333 n.1 (Ohio 1994). A high degree of specification is required, *see Manfredi, supra* (theory that a *portion* of a business' assets should be exempted from taxation could not be heard, because the notice of appeal sought *total* relief based on primary use of the assets); *Dupee v. Tracy*, 708 N.E.2d 698, 700-01 (Ohio 1999) (theory that passive investor may allocate S corporation income outside the state did not encompass

separate theory that income should be allocated outside the state because it was allegedly "non-business income").

Under the Ohio Supreme Court's precedents, Mid-America's failure to specify the partial immunity issue would dictate dismissal of the claim altogether, because "no reviewing court, including this one, has jurisdiction to hear this error, for it must be specifically assigned in the notice of appeal." *Osborne*, 532 N.E. 2d at 742. As a result, failure to specify would have constituted an "adequate and independent ground for the state court to disregard the claim." *Adams*, 520 U.S. at 87.

3. Mid-America's failure to press a claim of partial immunity unquestionably stunted the record pertaining to that issue. For example, the Indiana Supreme Court in the alleged "conflict" case apparently concluded that Mid-America is a "merged" as opposed to a "consolidated" entity, Pet. App. 34, 35 n.1; but what is available in the record of the present case tends to refute that theory (*e.g.*, the brand new charter for newly named entity; the shareholder disclosures indicating cancellation of old charters). Timely assertion would have allowed full development of the record before the Ohio Supreme Court.

Moreover, even the Indiana Supreme Court acknowledged that, on its face, the merger statute "does not establish what the tax implications are for the resulting ACA." Pet. App. 32. Instead, the Indiana court relied on excerpts from legislative history that were never specifically considered by the Ohio Supreme Court in support of an argument for partial immunity. Nor did the Ohio Supreme Court have the opportunity to consider the countervailing argument that, in actuality, the Farm Credit Act furnishes no support for Mid-America's new theory. For example, the statutory subpart heading at 12 U.S.C. 2279c describes the ACA in terms of a

"merger of like and unlike associations," and Mid-America was unquestionably a new entity with a new charter distinct from its predecessors. Mid-America's theory calls for a "pass through" of immunity that Congress did not supply. The absence of a "pass through" provision to ACAs is telling because Congress provided an express pass-through of immunity elsewhere in the Farm Credit Act, when it authorized Farm Credit System entities to form service-corporation subsidiaries, see 12 U.S.C. 2211, 2214. None of these points could be considered below because Mid-America failed to assert an issue of partial immunity in a timely manner.

B. *CoBank* provides adequate guidance for the state courts.

The Indiana Supreme Court decided the alleged "conflict" case *before* this Court's decision in *CoBank*. The Indiana high court relied on a structural and historical analysis of the Farm Credit Act to hold that the long-term mortgage business inherited from the FLBAs should enjoy immunity. By contrast, *CoBank* instructs the states that "in light of the structure of the Farm Credit Act – and the explicit grant of immunity to other institutions within the Farm Credit System – Congress's silence with respect to banks for cooperatives indicates that banks for cooperatives are subject to state taxation." 121 S. Ct. at 946. There is no reason to assume other states, and ultimately Indiana as well, will fail to apply *CoBank*'s teachings in future cases.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY
State Solicitor
ROBERT C. MAIER*
Assistant Solicitor
**Counsel of Record*

October, 2001

BOARD OF TAX APPEALS
STATE OF OHIO

FARM CREDIT SERVICES
OF MID-AMERICA, an
Agricultural Credit
Association,

Case No. _____
(Corp. Franchise Tax)

501 Fourth Ave.,
Suite 700
P.O. Box 34390
Louisville, KY 40232-4390
Ph: 502/566-3734
Fax: 502/566-3788

Appellant

Amount in Controversy:
1990: $300,981
1991: $378,500
1992: $660,147
1993: $720,704

v.

ROGER W. TRACY, TAX
COMMISSIONER OF THE
STATE OF OHIO
DEPARTMENT OF
TAXATION,

State Office Tower
P.O. Box 530
Columbus, Ohio 43266-0030

Appellee.

NOTICE OF APPEAL

NOW COMES FARM CREDIT SERVICES OF MID-AMERICA ("Appellant"), by its under-signed attorneys, MCDERMOTT, WILL & EMERY, and files this Notice of Appeal, pursuant to R.C. 5717.02, in response to the attached letter of final determination from the Tax Commissioner, and in support thereof states as follows:

1. Appellant is an Agricultural Credit Association chartered under Section 7.8 of the Farm Credit Act of 1971, as amended (12 U.S.C. 2279c-1).

2. Appellant is a member institution of the Farm Credit System. The Farm Credit System consists of a variety of cooperative lending institutions chartered under the Farm Credit Act of 1971, as amended (12 U.S.C. § 2001 et seq.) ("Farm Credit Act").

3. Congress has granted Federal Instrumentality status to Farm Credit System institutions, including Agricultural Credit Associations such as Appellant. 12 U.S.C. §§ 2023,

2027, 2098, 2134 and 2279c-1. Appellant's charter designates Appellant a "federally chartered instrumentality."

4. Under Article VI, clause 2 of the Constitution of the United States Constitution ("Supremacy Clause"), no State may impose upon the United States or its instrumentalities an obligation to pay any tax, unless Congress expressly consents to the tax. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819); United States v. State of Michigan, 851 F.2d 803 (6th Cir. 1988).

5. Congress has not consented to state taxation of Agricultural Credit Associations and, as a result, Appellant is exempt from state income and franchise taxes, including the Ohio Corporate Franchise Tax.

6. Appellant filed claims for refund requesting a full refund of Franchise Taxes paid with respect to years 1990 through 1993 ("Refund Claims").

7. By letter dated June 30, 1997, the Tax Commissioner issued a final determination disallowing the

refund claims in full (a copy of the final determination is attached hereto).

8. The Tax Commissioner erred in disallowing the Refund Claims. Appellant is an instrumentality of the United States and, as such, is exempt from State Taxation including the Ohio Franchise Tax. Farm Credit Services of Mid America v. Indiana Dep't of State Revenue, 1997 Ind. Tax Lexis 5 (Mar. 5, 1997).

WHEREFORE, for the reasons stated above, Appellant respectfully requests that the Board of Tax Appeals reverse the Tax Commissioner's final determination and grant the Refund Claims as requested.

Respectfully submitted,

/s/ Julia Diamond Cox
Julia Diamond Cox
Counsel for Appellant
Attorney # 0067416
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096
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Fax: 312/984-7700

CERTIFICATE OF FILING

I do hereby certify that a copy of the foregoing Notice of Appeal has been filed with the Board of Tax Appeals and with the Tax Commissioner by mailing same to the addresses listed below by United States Mail (certified – return receipt requested), on this 31st day of July, 1997:

James A. Rhodes
State Office Tower
24th Floor
30 East Broad Street
Columbus, Ohio 43215

Roger W. Tracy
State of Ohio Department of Taxation
State Office Tower
P.O. Box 530
Columbus, Ohio 43226-0030

/s/ Julia Diamond Cox
Julia Diamond Cox

STATE OF OHIO
DEPARTMENT OF TAXATION

In re 4 Refund Claims

FINAL DETERMINATION

Farm Credit Services of Mid-America, ACA
Hilliard Lyons Center
501 Fourth Avenue, Suite 700 JUN 30 1997
P.O. Box 34390
Louisville, KY 40232-4390

Corporate Franchise Tax
Tax Years: 1990-93

This matter comes on for final determination pursuant to R.C. 5733.12. It involves review of the following refund claims:

YEAR	Claim Number	Amount
1990	52055	$300,981.00
1991	52656	$378,500.00
1992	52657	$660,147.00
1993	52658	$720,704.00

The Tax Commissioner finds:

The claimant timely filed and paid its corporate franchise tax returns for the years at issue. These refund claims were filed to recover the full amount of corporate franchise tax paid for the years at issue. The claimant makes the following contention:

> Farm Credit Services of Mid-America, ACA, an Agricultural Credit Association, was formed by the merger of a Production Credit Association and Federal Land Bank Associations in accordance with the terms of the Agricultural Credit Act of 1987. Both the taxpayer and its predecessor entities are chartered as United States instrumentalities. See 12 USC § §2071(a), 2091(a), 2279c-1 and 2279g.
>
> As an instrumentality of the United States government, the taxpayer is exempt under the Constitution of the United States from the imposition of a tax by a state government.

The United States Supreme Court recently held:

> True, important consequences flow from the congressional decision to designate a PCA formed pursuant to statute as "an instrumentality of the United States." 12 U.S.C. §2071(b)(7). The tax immunity a PCA has under §2077 [on its "notes, debentures, and other obligations"] is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all of the rights and privileges of the National Government.
>
> *Arkansas v. Farm Credit Services of Central Arkansas, et al.* (1997), ___U.S.___; 65 USLW 4414; 1997 US Lexis 3395.

It is worth nothing that, unlike the production credit associations ("PCAs") at issue in that case. Congress has not

even proclaimed agricultural credit associations ("ACAs") to be "instrumentalities". In any event, the U.S. Supreme Court's reasoning means the immune or taxable status of "instrumentalities" must be determined by reference to the intent of Congress as expressed or implied in the statutes. Although some entities in the Farm Credit System are granted immunity from state taxation, there is no specific grant of immunity to ACAs in the Agricultural Credit Act of 1987, Pub. L. 100-233, or elsewhere. Congress expressly defined the instrumentality and tax status of both federal land bank associations (12 U.S.C. §§2091(a), 2098) and PCAs (12 U.S.C. §§2071(a), 2077) but remained silent as to the status of merged entities such as the claimant. The claimant, in essence, contends that silence in this regard on the part of Congress implies an immunity. However, principles of statutory construction lead to the conclusion that Congress intended that ACAs should *not* be exempt: *expressio unius est exclusio alterius*.

Moreover, if any doubt existed as to Congress' intent following passage of the Agricultural Credit Act of 1987, it was laid to rest in the Agricultural Credit Technical Corrections Act of 1988, Pub. L. 100-399, which added 12 U.S.C. §2279g. That provision expressly exempted from state taxation the transactions in connection with the type of merger that results in an ACA. Yet no mention is made of any ongoing exemption of ACAs from state taxation. Surely Congress cannot be presumed to have authorized such an exemption.

In *Department of Employment v. United States* (1966), 385 U.S. 355, the United States Supreme Court held that the American National Red Cross was the type of federal instrumentality immune from state taxation levied on its operations. The Court stated at 358-359:

> Although there is no simple test for ascertaining whether an instrumentality is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. . . . Although its operations are financed primarily from voluntary contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government.

In *Department of Employment v. United States,* the United States joined the plaintiff in its federal suit. In contrast, in *Arkansas v. Farm Credit Services of Central Arkansas, supra,* the Federal Government urged the Court to hold that the PCAs were not arms of the Government. The Court agreed, stating:

> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States. This suffices for us to conclude that instrumentality status does not in and of itself entitle any entity to the same exemption the United States has under the Tax Injunction Act.
> . . .

Since Congress addressed the scope of immunity and did not exempt the claimant from state corporate franchise taxes, it is not immune. The request for refund is denied.

THIS REFLECTS THE FINAL DETERMINATION OF THE TAX COMMISSIONER IN THIS MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PROVIDED IN R.C. 5717.02, THE MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

/S/ ROGER W. TRACY

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

Roger W. Tracy
Tax Commissioner

Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

BOARD OF TAX APPEALS
STATE OF OHIO

[Received Certified
MAR 17 1998
Dept. of Taxation
of Ohio Office of
Tax Commissioner]

FARM CREDIT SERVICES
OF MID-AMERICA, an
Agricultural Credit
Association,

Case No. _____
(Corp. Franchise Tax)

501 Fourth Ave.,
Suite 700
P.O. Box 34390
Louisville, KY 40232-4390
Ph: 502/566-3734
Fax: 502/566-3788

Appellant

Amount in Controversy:
1994: $ 655,782
1995: $ 857,171
1996: $1,420,998

v.

ROGER W. TRACY, TAX
COMMISSIONER OF THE
STATE OF OHIO
DEPARTMENT OF
TAXATION,
State Office Tower

P.O. Box 530
Columbus, Ohio 43266-0030

Appellee.

NOTICE OF APPEAL

NOW COMES FARM CREDIT SERVICES OF MID-AMERICA ("Appellant"), by its under-signed attorneys, MCDERMOTT, WILL & EMERY, and files this Notice of Appeal, pursuant to R.C. 5717.02, in response to the attached letter of final determination from the Tax Commissioner, and in support thereof states as follows:

1. Appellant is an Agricultural Credit Association chartered under Section 7.8 of the Farm Credit Act of 1971, as amended (12 U.S.C. 2279c-1).

2. Appellant is a member institution of the Farm Credit System. The Farm Credit System consists of a variety of cooperative lending institutions chartered under the Farm Credit Act of 1971, as amended (12 U.S.C. § 2001 et seq.) ("Farm Credit Act").

3. Congress has granted Federal Instrumentality

status to Farm Credit System institutions, including Agricultural Credit Associations such as Appellant. 12 U.S.C. §§ 2023, 2027, 2098, 2134 and 2279c-1. Appellant's charter designates Appellant a "federally chartered instrumentality.

4. Under Article VI, clause 2 of the Constitution of the United States Constitution ("Supremacy Clause"), no State may impose upon the United States or its instrumentalities an obligation to pay any tax, unless Congress expressly consents to the tax. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819); United States v. State of Michigan, 851 F.2d 803 (6th Cir. 1988).

5. Congress has not consented to state taxation of Agricultural Credit Associations and, as a result, Appellant is exempt from state income and franchise taxes, including the Ohio Corporate Franchise Tax.

6. Appellant filed claims for refund requesting a full refund of Franchise Taxes paid with respect to years 1994 through 1996 ("Refund Claims").

7. The Tax Commissioner issued a final determination disallowing the refund claims in full (a copy of the final determination is attached hereto).

8. The Tax Commissioner erred in disallowing the Refund Claims. Appellant is an instrumentality of the United States and, as such, is exempt from State taxation including the Ohio Franchise Tax. Farm Credit Services of Mid America v. Indiana.

WHEREFORE, for the reasons stated above, Appellant respectfully requests that the Board of Tax Appeals reverse the Tax Commissioner's final determination and grant the Refund Claims as requested.

Respectfully submitted,

/s/ David Fuller
David Fuller
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Attorney # 0026817
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CERTIFICATE OF FILING

I do hereby certify that a copy of the foregoing Notice of Appeal has been filed with the Board of Tax Appeals and with the Tax Commissioner by mailing same to the addresses listed below by United States Mail (certified – return receipt requested), on this 12th day of March, 1998:

James A. Rhodes
State Office Tower
24th Floor
30 East Broad Street
Columbus, Ohio 43215

Roger W. Tracy
State of Ohio Department of Taxation
State Office Tower
P.O. Box 530
Columbus, Ohio 43226-0030

/s/David Fuller
David Fuller

A-17

STATE OF OHIO
DEPARTMENT OF TAXATION

In re Refund Claim No. 61106

FINAL DETERMINATION

JAN 07 1998

Farm Credit Services
of Mid-America, ACA
P.O. Box 34390
Louisville, KY 40232-4390

Corporate Franchise Tax
Tax Year: 1996

This matter involves the above claim for refund.

A review of the claim and all available information in support thereof reveals that no refund is properly certifiable under R.C. 5733.12.

Accordingly, the claim is denied.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/S/ ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

I HEREBY CERTIFY THE
FOREGOING TO BE A TRUE
AND CORRECT COPY OF THE
ACTION OF THE TAX
COMMISSIONER TAKEN THIS
DAY WITH RESPECT TO THE
ABOVE MATTER.

Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

A-19

STATE OF OHIO
DEPARTMENT OF TAXATION

In re Refund Claim No. 61107

FINAL DETERMINATION

JAN 07 1998

Farm Credit Services
of Mid-America, ACA
P.O. Box 34390
Louisville, KY 40232-4390

Corporate Franchise Tax
Tax Year: 1995

This matter involves the above claim for refund.

A review of the claim and all available information in support thereof reveals that no refund is properly certifiable under R.C. 5733.12.

Accordingly, the claim is denied.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/S/ ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

I HEREBY CERTIFY THE
FOREGOING TO BE A TRUE
AND CORRECT COPY OF THE
ACTION OF THE TAX
COMMISSIONER TAKEN THIS
DAY WITH RESPECT TO THE
ABOVE MATTER.

Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

STATE OF OHIO
DEPARTMENT OF TAXATION

In re Refund Claim No. 61108

FINAL DETERMINATION

JAN 07 1998

Farm Credit Services
of Mid-America ACA
P.O. Box 34390
Louisville, KY 40232-4390

Corporate Franchise Tax
Tax Year: 1994

This matter involves the above claim for refund.

There is no jurisdiction to consider the claim since it was not filed within the time required by R.C. 5733.12.

Accordingly, this matter is dismissed.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/S/ ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

IN THE SUPREME COURT OF OHIO

Farm Credit Services of Mid-America, an Agricultural Credit Association,	)	00-505
Appellant,	)	Appeal from the Ohio Board of Tax Appeals
v.	)	
Roger W. Tracy, Tax Commissioner of Ohio,	)	Board of Tax Appeals Case Nos. 97-T-889 and 98-T-333
Appellee.	)	

NOTICE OF APPEAL OF APPELLANT FARM CREDIT SERVICES OF MID-AMERICA

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[FILED: MAR 17 2000
BOARD OF TAX
APPEALS
COLUMBUS, OHIO]

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[FILED: MAR 17 2000
MARCIA J. MENGEL,
CLERK, SUPREME
COURT OF OHIO]

Notice of Appeal of Appellant Farm Credit Services of Mid-America

Appellant Farm Credit Services of Mid-America hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in Case No. 97-T-889 and 98-T-333 on February 18, 2000. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

The appellant complains of the following errors in the Decision and Order of the Board of Tax Appeals:

1. The Commissioner's final determinations disallowing Farm Credit Services of Mid-America's claims for refund of Ohio franchise tax for the periods 1990 through 1996 should be reversed.

2. Farm Credit Services of Mid-America is an Agricultural Credit Association chartered under Section 7.8 of the Farm Credit Act of 1971, as amended (12 U.S.C. 2279c-1). Farm Credit Services of Mid-America's charter specifically designates Farm Credit Services of Mid-America as a "federally chartered instrumentality."

3. Federal Instrumentalities are exempt from state taxation absent express Congressional authorization. U.S. Const. art. VI, cl. 2; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

4. By virtue of its status as a Federal Instrumentality, Farm Credit Services of Mid-America is exempt from state taxation absent express Congressional authorization.

5. Congress has not expressly authorized the state taxation of Agricultural Credit Associations. As a result, Farm Credit Services of Mid-America is exempt from Ohio taxation, including the Ohio franchise tax. See, Farm Credit Services of Mid-America v. Indiana Department of State Revenue, 677 N.E.2d 645 (Ind. Tax Ct. 1997), *appeal denied,* (Ind. 1997); Farm Credit Services of Mid-America v. Indiana Department of State Revenue, 705 N.E.2d 1089 (Ind. Tax Ct. 1999), *appeal granted,* (Ind. 1999); see also, Farm Credit Services of Central Arkansas v. Arkansas, No. LR-C-94-394 (E.D. Ark. 1995), *aff'd by,* Farm Credit Services of Central Arkansas v. Arkansas,

76 F.3d 961 (8th Cir. 1996), *rev'd on other grounds*, Arkansas v. Farm Credit Services of Central Arkansas, 520 U.S. 821 (1997); Farm Credit Services of Central Arkansas v. Arkansas, No. 94-4931 (Ark. Chancery Ct. 1998), *aff'd by*, Farm Credit Services of Central Arkansas v. Arkansas, 994 S.W.2d 453 (Ark. 1999), *petition for cert. filed,* 68 U.S.L.W. 3401 (Sept. 28, 1999) (No. 99-993); Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue, 10 S.W.3d 142 (Mo. 2000); Northwest Louisiana Production Credit Association v. Louisiana, 746 So.2d 280 (La. Ct. App. 1999) (Each of the above cited cases determined that a member of the Farm Credit System, namely Production Credit Associations, which are predecessors to Agricultural Credit Associations, are exempt from state taxation for periods after 1985).

6. Farm Credit Services of Mid-America is entitled to a refund of all Ohio franchise tax paid during the tax years 1990 through 1996, plus interest as provided by law.

7. The Ohio Board of Tax Appeals properly concluded that, due to the Constitutional issues involved, it lacked the jurisdiction to decide the claims raised by Farm Credit Services of Mid-America in support of its claim for refund of Ohio franchise tax for the years 1990 through 1996.

8. Farm Credit Services of Mid-America respectfully requests that this Honorable Court reverse the Tax Commissioner's final determinations and grant Farm Credit Services of Mid-America's refund claims as requested.

Respectfully submitted,

By: */s/ John A. Biek*
John A. Biek (0039009)
(COUNSEL OF RECORD)

COUNSEL FOR
APPELLANT,
FARM CREDIT SERVICES
OF MID-AMERICA

Proof of Service

I certify that a copy of this Notice of Appeal was sent by certified mail to counsel for Appellee, Betty D. Montgomery, Attorney General of Ohio, and Robert C. Maier, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 on March 16th, 2000.

/s/Theodore R. Bots
Theodore R. Bots

COUNSEL FOR
APPELLANT,
FARM CREDIT SERVICES
OF MID-AMERICA

[The Ohio Board of Tax Appeals Decision was originally attached here. That Decision has already been presented to the Court in the Appendix to the Petition for Certiorari, Pet. App. 8-12.]